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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

JOSEPH PAUL JERNIGAN,
PETITIONER

-V-

THE STATE OF TEXAS,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PHILIPS, WHITE, DAVIDGE, GRIFFIN,
SHELTON, EAMES, WOOD & DUNCAN
Attorneys at Law
101 N. Elm Street
Denton, Texas 76201
817/566-7010

By: M. P. Duncan III

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 1983, a true and correct copy of the Petition for Writ of Certiorari to the Texas Court of Criminal Appeals, was placed in the United States Mail, first class postage prepaid, addressed to Mr. Patrick C. Batchelor, District Attorney, Navarro County Courthouse, Corsicana, Texas 75110, and to Jim Mattox, Attorney General for the State of Texas, State Capitol, Austin, Texas 78711. I further certify that all parties required to be served have been served.

SIGNED this 19th day of September, 1983.

Original Signed By
M. P. DUNCAN III

M. P. DUNCAN III

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH PAUL JERNIGAN,
Petitioner

-V-

THE STATE OF TEXAS,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, JOSEPH PAUL JERNIGAN, moves the Court for an order permitting him to prosecute a Petition for Writ of Certiorari to review a Judgment of the Texas Court of Criminal Appeals, entered April 27, 1983, in forma pauperis, pursuant to 28 U.S.C. §1915, and in support of this Motion attaches hereto the Affidavit of the Petitioner.

Respectfully submitted,

Original Signed By
M.P. DUNCAN III

M. P. Duncan III
Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH PAUL JERNIGAN,
Petitioner

-V-

THE STATE OF TEXAS,
Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, JOSEPH PAUL JERNIGAN, being first duly sworn, depose and state that I am the Petitioner in the above styled cause; that in support of my Motion to Proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to the relief I seek; and that the issue which I desire to have heard in this proceeding is as follows: Whether the Texas Court of Criminal Appeals erred in affirming my conviction of capital murder when two (2) prospective jurors were excused by the trial court in violation of the constitutional standards enunciated in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and Adams v. Texas, 488 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the Petition for Writ of Certiorari are true:

1. Are you presently employed?

   "No"

2. Have you received within the past twelve (12) months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other sources?

   "No"

3. Do you own any cash or checking or savings accounts?

   "No"

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   "No"

5. List the persons that are dependent upon you for support and state your relationship to those persons.

   "None"

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Joseph P. Jernigan
JOSEPH PAUL JERNIGAN

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this 14 day of September, 1983.

Notary Public, State of Texas
COMCP 10-25-86

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOSEPH PAUL JERNIGAN,
Petitioner

-V-

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF THE CRIMINAL APPEALS OF TEXAS

The Petitioner, JOSEPH PAUL JERNIGAN, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Texas Court of Criminal Appeals, entered in this proceeding on April 27, 1983.

I.

OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS

The Opinion of the Texas Court of Criminal Appeals is unreported; however, a copy of such Opinion is attached hereto as Appendix A.

II.

JURISDICTION

The Order of the Texas Court of Criminal Appeals was entered April 27, 1983. This Petition for Writ of Certiorari was filed pursuant to an Order of this Court dated August 8, 1983, extending the time for filing this Petition for Writ of Certiorari until September 20, 1983.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). The Petitioner asserted in the Texas Court of Criminal Appeals and asserts here a deprivation of rights secured by the Constitution of the United States.

III.

QUESTION PRESENTED

Whether the Texas Court of Criminal Appeals correctly applied the constitutional standards of juror exclusion in capital murder cases as set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 488 U.S. 38 (1980), when it reviewed the rulings of the trial court and its exclusion of the two (2) prospective jurors.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

2. In addition, this case involves the following Texas statutes:

§19.03(a)(2) TEX. PENAL CODE:

"[T]he person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson."

§12.31(a) TEX. PENAL CODE:

"An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death."

V.

STATEMENT OF THE CASE

The Petitioner, Joseph Paul Jernigan, was indicted for the July 3, 1981, murder of Edward Hale, alleged to have occurred during the course of committing a burglary and robbery.

The Petitioner was tried in the 13th Judicial District Court of Navarro County, Texas. Jury selection began on October 26, 1981, and concluded on October 29, 1981. The Petitioner's trial proceeded, and he was found guilty and sentenced to death on November 4, 1981.

In his appeal to the Texas Court of Criminal Appeals the Petitioner asserted that the following venire persons were excluded in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980):

a. Sheila Wafer, and

b. Billy Anderson.

The Petitioner's contentions on appeal were rejected by the Texas Court of Criminal Appeals [see Appendix A] and the question presently being presented arises from that review of his conviction.

INDIVIDUAL VOIR DIRE EXAMINATION OF VENIRE PERSON SHEILA WAFER

Mrs. Sheila Wafer was excused as a juror by the trial court over the Petitioner's contemporaneous objection pursuant to the prosecution's challenge for cause that she was irrevocably opposed to the death penalty.

Although a complete transcript of Mrs. Wafer's examination is annexed hereto as Appendix B, the excerpts relevant to the question being presented are hereinafter noted.

For example, the State's initial inquiry concerning the essence of Mrs. Wafer's somewhat waivering objections to the death penalty was answered conversely to the position taken in its challenge for cause.

Q [By the District Attorney] Then, at this time, your opinion against the death penalty is set and fixed firm, is it not?

A No, not for, you know--I don't know. I'm so nervous, I ain't never did this before. But anyway, you

know, if I think -- if I heard something, you know, like if I was on serving as a juror or something like that, and I felt that this person done something wrong, you know, if it was real bad, then, I think I had to after thinking about it and --. B/179[1]

Following the State's interruption of her response, Mrs. Wafer's answers to the State's question appear to support its challenge for cause. At least and until the following exchange:

Q Are your feelings against the death penalty so strong that you would feel compelled to answer one or more of the questions no so that the defendant could not get the death sentence, but would get the life imprisonment sentence?

A I would, you know, if my feelings would probably be life sentence.

Q Okay. And you would feel like that you would have to answer one of those questions no so he would get the life sentence instead of the death penalty?

A Yes. B/184-185

An equitable reading of this dialogue suggests that Mrs. Waver would vote "no" to one of the issues only if she thought a life sentence was appropriate. However, following further suggestive questioning, Mrs. Wafer did state she would vote against the death penalty "regardless of the facts and circumstances that might emerge in the course of the proceedings." B/185

The Petitioner's examination of Mrs. Wafer, however, casts her opinion about the death penalty in a different light.

Q [By Defense Counsel] Now, this or any other case, after all the evidence is in, the Court gives what is called

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1. All references to testimony will be noted initially to the proper Appendix, then the page of the Appendix.

a charge to the jury. It's in writing. He tells them what the law is in this particular case, and that you happen to be on a jury, and maybe a burglary case, maybe a murder case. Maybe a theft case, but he tells the jury what the law is on that particular case, the one being tried.

Is there any reason why you couldn't follow the law as the court tells you it is?

A No.

Q If you were a juror in this particular case, he would tell you what constitutes murder. Could you and would you follow the court's charge as to what murder is?

A Well, I could.

Q The Court may tell you in this or any other case what evidence you can consider and that evidence you cannot consider. Will you follow what His Honor tells you if you are on this jury or any other jury in this matter?

A I don't really understand what you are talking about.

Q Well, the Court may tell you that, for example, that you shall not consider, and he's already told you that you shall not consider the indictment as any evidence at all. He may tell you that other things should not be considered. Is there any reason why you couldn't follow the Court's charge in that respect?

A No.

Q If you sat on this or any other capital murder case, and you and the other jurors found the defendant guilty, then a capital murder case, you would have to answer those first two questions up there for sure. Is there any reason why you couldn't answer those questions based upon the evidence as you have heard it?

A No, not from listening to the evidence, I couldn't but -- B/188-190

Upon the State's redirect examination Mrs. Wafer's response to the questioning about her role in the process of imposing a death penalty is hardly indicative of one who is adamantly opposed to the sentence of death: "I don't think I can, no." B/191

INDIVIDUAL VOIR DIRE EXAMINATION
OF VENIRE PERSON BILLY ANDERSON

Mr. Billy Anderson was also excused as a juror by the trial court on the same basis and over the same objection as was Mrs. Wafer. However, the absence of any absolute opposition to the death penalty is more apparent in Mr. Anderson's response than Mrs. Wafer's.

A complete transcription of Mr. Anderson's voir dire examination is annexed hereto as Appendix C. However, for brevity and clarity, specific passages, applicable to the issue being presented to the Court, will be duplicated when essential.

The prevading characteristic of the entire voir dire examination of Mr. Anderson is the pragmatic time limitation apparent in his responses. For example, after explaining the nature of the prosecution (capital murder) and inquiring as to the venire person's feelings about the death penalty, the prosecutor asked and Mr. Anderson answered:

Q [By the District Attorney] Even if you were sworn as a juror to return a true verdict upon the evidence, are you telling us and the Court that you could never recommend a sentence of death, regardless of the evidence?

A Well, <u>right now</u> [emphasis added], yeah. I would have to say that I couldn't recommend a death sentence. C/436

In addition, after noting some hesitation in some preceding questions the State's attorney inquired further.

Q [By the District Attorney] There was some hesitancy, and what we want to do is make it -- you need to make it clear as you possibly can. I know some of these questions are hard, but only you know the correct answers. If you could sit on a jury and you could consider the death penalty, and if the evidence showed that the death penalty should be inflicted, the question is, could you do it because of your objection to the death penalty?

A Well, I really don't know, but as far as right now, I would have to say no, you know. C/438-439

On redirect examination Mr. Anderson again restricted his answer to the time of the voir dire examination.

Q [By the District Attorney] Is what you are saying -- I may not be understanding, and I'm not trying to preach to you. I hope you understand that. If you were on a case because if your conscientious feelings against the death penalty, the evidence showed that the answers to the questions should be yes, beyond a reasonable doubt, because -- knowing that if you answered all those questions yes, that the defendant would get the death penalty. Is this a case where because of your feelings against the death penalty you personally could not answer them yes?

A No, I don't think I could answer them all yes.

Q Are you sure about that?

A Yes, as far as right now, yeah.

Q Okay.

A I'm sure.

Q Then, at this time before the trial begins, are you telling us you are irrevocably committed to vote, where all the questions would not be answered yes, so the death penalty would not be imposed, no matter what the

evidence or the facts?

A Yeah, at this time. Yeah, I would have to say yes. C/445-447

Upon examination by defense counsel, when the question of the venire person's capability of imposing the death penalty was predicated by detailing his role as juror, Mr. Anderson's responses, unlike those on direct and redirect, were not plagued by time constraints or doubt. For example:

Q [By Defense Counsel] And, then if you found you and the other members of the jury, in that hypothetical case, found the defendant guilty, could you answer those three questions if submitted to you, up there, based upon the evidence in the case and the evidence alone? Could you answer them yes or no based upon the evidence as you found it to be

A Yes, sir, I could. C/442

Also:

Q [By Defense Counsel] If you are on this jury, and knew, the jury has found the person guilty, the person being tried, would you and could you answer those questions according to that evidence as you find them, yes or no? Whatever they may be, would you answer accordingly?

A Yes, I think I could. C/449

The jury that was ultimately selected and impaneled convicted the Petitioner and sentenced him to die.

VI.

FEDERAL QUESTIONS AND DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS

In his appeal to the Texas Court of Criminal Appeals the Petitioner contended that three prospective jurors were excused in violation of the constitutional standards set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980). However, the Texas Court of Criminal Appeals rejected this contention through the following language:

> Based upon our consideration of the whole of the voir dire of the excluded veniremembers [Pickett, Anderson, and Wafer], we find that each of them made clear that he or she would 'automatically' vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them ....[2] [citations omitted]

From this conclusion, as it is applicable to veniremembers Sheila Wafer and Billy Anderson, the Petitioner has pursued this Petition for Writ of Certiorari.[3]

VII.

REASON FOR GRANTING THE WRIT OF CERTIORARI

This Honorable Court should grant certiorari to consider whether the Texas Court of Criminal Appeals improperly applied the rules of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S.44 (1980), when it affirmed the trial court's excusing two prospective jurors for cause when neither prospective juror stated they would automatically vote against the death penalty.

VIII.

ARGUMENT

During voir dire examination the trial court, over the Petitioner's contemporaneous objection, granted the state's challenge for cause and excused from jury service Mrs. Sheila Wafer and Mr. Billy Anderson. It is apparent from an examination of the transcription of their answers during the voir dire examination that neither prospective juror expressed anything more than general objections to the death penalty.

It has repeatedly been stated since 1968 that this Court's opinion in Witherspoon v. Illinois, 391 U.S. 510 (1968) established a two-prong test to determine if a prospective juror is disqualified

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2. A/10-11.

3. The Petitioner is not contesting the exclusion of venireperson Pickett.

from jury duty in a capital case. First, to be subject to exclusion for cause the prospective juror must make it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed." Id. at 522-533, fn. 21. Or, secondly, "that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Id. Absent such affirmative declaration a prospective juror cannot be constitutionally excluded from jury service. And, because of the magnitude of the punishment the death penalty cannot be imposed if even one prospective juror has been excluded in violation of Witherspoon v. Illinois, supra; Davis v. Georgia, 429 U.S. 122 (1976); Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), affirmed 626 F.2d 396 (5th Cir. 1980)(en banc).

Due to the widespread variation of beliefs relative to the social or moral utility of capital punishment, and with much of the public forming no unconditioned opinion, whether affirmative or negative, about the topic, the courts have vacillated on their factual application of the test's first prong.

Although initially and primarily concerned with the issue resolved by this Court in Adams v. Texas, 448 U.S.38 (1980), the Fifth Circuit Court of Appeals in Burns v. Estelle, supra, examined the issue of when a juror's answers about the death penalty reach Witherspoon proportions. In Burns v. Estelle, supra, venire person Mrs. Doss stated that she did not believe in the death penalty. However, this alone according to the Fifth Circuit does not constitute satisfaction of either prong of the test established in Witherspoon v. Illinois, supra.

In Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981) the Court of Appeals made the following statement: "It does not appear that these veniremen were incapable of voting in full accord with the evidence, as they viewed it, and with the judge's charge." Id. at 563. Thus, "automatically . . . [voting] against the death penalty . . .," Id., by implication

includes the consideration that one would not vote in accord with the evidence or would not follow the Court's instruction. Pierson v. State, 614 S.W.2d 102 (Tex.Cr.App. 1981).

Rather than merely assume that one is unequovically opposed to the death penalty, the law in the Fifth Circuit requires "strict adherence to the mandates of Witherspoon." Granviel v. Estelle, 655 F.2d 673 (1981), cert. denied _____U.S._____, 102 S.Ct. 1636 (1982); Goodwin v. Balkom, 684 F.2d 794 (5th Cir. 1982). In Granviel v. Estelle, Id., the Court of Appeals examined in detail the voir dire examinations of five prospective jurors who had been successfully, albeit unconstitutionally, challenged for cause by the State. One aspect of each examination that is obviously and continually repeated is each prospective juror's lack of decisiveness when asked if he or she could participate in a proceeding in which the death penalty could be invoked.

Although relevant portions of the voir dire examinations are reproduced as an Appendix to the Court's opinion, it is appropriate to concisely observe the similarities:

JUROR	STATE'S QUESTION	ANSWER	PAGE
1.Donald Harrison	Let me ask you, personally sitting as a juror, could you ever vote so as to inflict the death penalty?	No, I don't think I could.	684
2.Homer N. Lipscomb	[B]ut the question is, of course, whether or not you yourself could personally take part in making decisions which you knew would result in the death of a human being.	I don't think I would.	685
3.Inez Wallace	[B]ut what I need to know is whether you yourself could personally take part in a trial and personally make decisions which might result in the death of another human being.	I don't think I could.	686
4.Mrs. Roy F. Cox	You just wouldn't do it? [Vote for the death penalty.]	I don't think I would with all due consideration.	687

5.Mattie O. Vernon	I'm sorry. I thought you told me that a life was a life and you just couldn't be involved in taking a life even if it was by jury verdict.	Really I am serious. I just don't know.	688

Mrs. Wafer's responses to the prosecutor's questions were very similar to those of the jurors in Granviel v. State, supra. Mrs. Wafer never did make it "unmistakably clear that . . .[she] would automatically vote against the imposition of the death penalty. . . ." Witherspoon v. Illinois, supra, fn.21. And, rather than state that she would distort her opinion of a defendant's guilt because of her feelings about the death penalty, Mrs. Wafer unhesitatingly acknowledged she could find someone guilty or not guilty of the offense depending on the evidence. B/188

Mr. Jones initially expressed a general opposition to the death penalty; however, on examination by defense counsel Mr. Jones stated that he could follow the law and answer the special issues yes or no based on the evidence. C/442

In Moore v. Estelle, 670 F.2d 56 (5th Cir. 1982) the Court of Appeals reviewed a juror's response not unlike those of Mr. Jones.

> She [the prospective juror] maintained, however, that while she was reluctant to be a part of the proceeding and her feelings would'affect' her deliberations, still she 'would answer the questions truthfully but I don't know that I would ever feel good about it.' Id. at 57.

Immediately preceeding this quotation, the Court made the following rather decisive comment disposing of the issue: "We need go no further than to examine the testimony of Katherine C. Kearby, one of these three, to conclude that at least one was wrongly excluded." Id.

It is apparent from Moore v. Estelle, supra, that general objections to the death penalty, particularly when contrasted with a prospective juror's concession that he or she would nonetheless abide by the trial court's instructions, is insufficient to produce an exclusion of that juror under the tenets of Witherspoon v. Illinois, supra.

By excusing Mrs. Wafer and Mr. Anderson from jury service in this capital murder prosecution the State and the trial court "entrust[ed] the determination of whether a man should live or die to a tribunal organized to return a verdict of death." [4] Witherspoon v. Illinois, supra.

Any defendant, irrespective of the nature or character of his offense, is entitled to more consideration than that given to Mr. Jernigan. This Court has made it abundantly clear that "[N]o defendant can constitutionally be put to death at the hands of a tribunal . . . selected," Witherspoon v. Illinois, supra at 522-523, as was the one in this case. However, in light of the Texas Court of Criminal Appeals summary review and its application of the Witherspoon rules to this voir dire, unless review is granted, the State will accomplish what this court has condemned: a decision to kill a man by "a jury [that] fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." Id. at 518.

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4. According to the trial court's docket sheet, annexed hereto as Appendix D, the jury was read the court's instructions applicable to punishment on November 4, 1981, at 1:00 p.m., began deliberating Mr. Jernigan's fate at 1:44 p.m., and fifteen (15) minutes later, at 1:59 p.m., announced by their verdict he should die. It is appropriate to note that it took the court forty-four minutes to read the instructions and the jury twenty-nine minutes less to put the wheels of death in operation.

IX.
CONCLUSION

Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

PHILIPS, WHITE, DAVIDGE, GRIFFIN,
SHELTON, EAMES, WOOD & DUNCAN
101 N. Elm Street
Denton, Texas 76201
817/566-7010

Original Signed By
M.P. DUNCAN III

By _____
M. P. DUNCAN III
State Bar #06222000

ATTORNEYS FOR PETITIONER

APPENDIX A

TC-83-17-059

JOSEPH PAUL JERNIGAN, Appellant

NO. 68,919 v. - - - Appeal from NAVARRO County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appellant was convicted of capital murder. Upon the jury's findings that the killing was deliberate and that appellant represents a continuing threat to society, punishment was assessed at death. Art. 37.071, V.A.C.C.P.

Appellant now contends that his arrest and his subsequent confession, which was [illegible] were tainted by the unlawful procurement of a warrant. The basis of his contention is that appellant's wife was the informant relied upon by the affiant in obtaining the warrant and because she cannot testify against her husband, the affidavit was insufficient [illegible] the issuance of the warrant.

Appellant relies upon this Court's decision in Stribling v. State, 215 S.W. 857 (Tex.Cr.App. 1919), in which it was held that an information could not be supported by a complaint sworn to by the spouse of an accused. In that case, the court said: "a wife, being an incompetent witness against her husband, cannot be regarded as a credible witness within the statute...."

Assuming the role of Stribling maintains its vitality, [1/] appellant's reliance is nonetheless misplaced. Appellant

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1/ We note that "the statute", Art. 479 of the Tex.Code of Cr.Proc. (Vernon's, 1911), like its current successor, Art. 21.22, V.A.C.C.P., requires that an affidavit, to support information, must be sworn to by a credible person, not a credible witness. But see footnote 4, infra.

confounds the nature of the affidavits provided for under Arts. 21.22 and Art. 15.05,[2] probably because each is called a "complaint".

Art. 15.05 and Art. 21.22 are derived from separate provisions of the previous codes, and have remained separate.[3] Further, their purposes are separate.[4]

~~The question presented by appellant's contention, thus, is whether Article 38.11, V.A.C.C.P. prohibits the use of information supplied by a person to obtain an arrest warrant naming that person's spouse.~~ Art. 38.11 provides in pertinent part:

> "Neither husband nor wife shall, in any case, testify as to any communications made by one to the other while married.... The husband and wife may, in all criminal actions, be witnesses for each other, but ... they shall in no case testify against each other in a criminal prosecution...." [Emphasis supplied]

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[2] Art. 15.05, V.A.C.C.P. sets out the requisites of a "complaint" in support of a warrant of arrest.

[3] Art. 15.05 derives from Art. 220 of the 1856 Code, then succeeded through slight modifications as Arts. 269 and 222 of the 1911 and 1925 Codes, respectively, Art. 21.22's lineage runs from Art. 404 of the Old Code through Arts. 479 and 415 of the codes of 1911 and 1925.

[4] It may be appropriate, for example, to refuse to permit incompetent statements in an affidavit to supply the basis for an information, in that, no further document being needed to bring the accused to trial, no showing that competent evidence would be available at trial would open the door to prosecutorial abuse. A lack of evidence competent at trial should not and does not preclude the issuance of an arrest warrant, however. A warrant is procurable upon hearsay information where circumstances showing the credibility of the informant and the reliability of the information are shown, Jones v. State, 568 S.W.2d 847, cert. den. 439 U.S. 959, 99 S.Ct. 363, 58 L.Ed.2d 352 (1978). An arrest, while part of the accusatory process, may also be part of the investigatory process - as shown by the instant case. And, as here, mere arrest is insufficient to bring the accused to trial.

The language of Art. 38.11 speaks to testimony in a criminal proceeding. Here there was no testimony; indeed there was no criminal proceeding until after the warrant was procured. Nothing in Art. 38.11 prohibits the use of information supplied by a person other than as evidence in a criminal proceeding. A spouse as informant[5/] does not violate Art. 38.11's strictures. The ground of error is overruled.

Appellant next contends the court erred in overruling his motion to dismiss veniremember Nesmith for cause.

Upon voir dire examination of Nesmith by the State, the following exchange occurred:

"Q. Can you put aside everything that you have heard and read about this case and if you are selected as a juror, render your verdict solely on the evidence that comes to you from that witness stand?

"A. I think my -- I might be biased in that opinion, come from - - I knew the man pretty well.

"Q. Okay. Well, only you know.

"A. I might."

[redacted] The State's voir dire then continued:

5/ The distinction between informants and witnesses, and, a priori between information and testimony, was explicated, in a different context, in Jones v. State, 628 S.W.2d 51 (Tex.Cr.App. 1981). In that case, the appellant was convicted of retaliation against a witness, see V.T.C.A. Penal Code, Sec. 36.06, but the proof showed only retaliation against an informant, which is also denounced by Sec. 36.06, but which was not alleged. Although that case was affected by the inclusion in Sec. 36.06(b) of a definition of "informant" for the purposes of that section, we think the same principles apply here.

"Q. You don't know this particular defendant, do you?

"A. No, sir.

"Q. You haven't established a conclusion as to his guilt or innocence at this time, have you now?

"A. No, sir.

"Q. Then, you feel like that you could listen to the evidence and base that verdict solely on that evidence and not because of anything you have heard?

"A. Yes, sir.

"Q. You are sure about that?

"A. (Juror nods.)

"Q. Can you wait until you hear all of the evidence before you decide he is guilty or innocent?

"A. Yes, sir."

[redacted] The following exchange then occurred:

"Q. Even the tiniest bit you could be?

"A. I could be, yes, sir.

"Q. That would be based upon knowing him and perhaps what you have heard about this case?

"A. Yes, sir.

"Q. Your Honor, we submit that because he has used the magic word, that he should be excused in this case.

"MR. BATCHELOR: Your Honor, he hasn't been shown to be excused for cause. Just because he says that he might be biased does not excuse him for cause. Now, he may be, but Mr. Morris needs -- I don't think he's gone into that far enough.

"THE COURT: Do you have any further questions at this time?

"MR. MORRIS: I might, yes, sir.

"THE COURT: I'm going to deny your motion at this time.

"MR. MORRIS: All right.

"Q. (By Mr. Morris) I know you are going to be honest with us, Mr. Nesmith, and from knowing the man, can you honestly say from your heart, that you would be biased at least the tiniest bit of bias and prejudice in this case, if you served as a juror?

"Q. If I was chosen as a juror, no, sir. That's my duty to be a juror, but if I'm chosen as a juror, no, sir, I will not be biased. I will come in here with an open mind.

"Q. But at this moment, you do have such a feeling, don't you?

"A. Yes, sir, right now.

"Q. You have a small, at least a small amount of bias?

"A. Yes, sir.

"Q. Again, we submit, your Honor, that he is not qualified in this case, because of that feeling.

"THE COURT: Mr. Morris, I'm going to overrule your objection at this time."

The remainder of the appellant's voir dire centered around whether Nesmith could, upon signing or participating in a verdict of not guilty, return to his community and "look people in the eye". Nesmith stated unequivocally that he could. No further examination was undertaken upon the issue of bias.[6/]

[redacted] Williams v. State, 565 S.W.2d 63 (Tex.Cr.App. 1978), [redacted] such bias toward appellant as shown here. The "bias"

6/ At the close of the voir dire of Nesmith, appellant renewed his motion to excuse and, upon receiving an unfavorable ruling, exercised a peremptory challenge. A request for an additional peremptory challenge was made and denied upon the seating of the twelfth juror, who appellant stated was unacceptable. This ground of error was thereby properly preserved for review.

633 S.W.2d 851 (Tex.Cr.App. 1982),

Although it is apparent that Nesmith's friendship with the victim was closer than the acquaintanceships relied on in Anderson, the record reveals no more definitive statement of the nature and effect of that friendship than has been set out, supra. While it seems likely that the relationship might have affected Nesmith's ability to avoid bias against appellant in considering the questions on punishment once the jury had determined guilt, the voir dire was directed entirely to the issue of the determination of guilt or innocence. As the proponent of Nesmith's exclusion for cause under Art. 36.16, V.A.C.C.P., the burden of showing grounds for such exclusion rested upon appellant.[7/]

The ground of error is overruled.

7/ Such grounds may be shown by extrinsic evidence, Art. 35.18, V.A.C.C.P., as well as by the veniremember's answers on voir dire. Upon appeal, review will be based upon the entire voir dire of the veniremember as well as the extrinsic evidence, if any. Anderson, supra, 633 S.W.2d 854.

Appellant next contends the court erred in excusing three veniremembers who expressed only general objections to the death penalty, in violation of the rule of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 77[illegible] (1968), and Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

Veniremember Pickett stated that his longstanding opposition to the death penalty would require him to vote against that penalty in every case, regardless of the facts. Upon being informed of the determinations of fact to be made by jurors during the punishment phase of capital murder trials upon a prior finding of guilty, Pickett stated he would answer one question "no" in every case in order to prevent a sentence of death; he further stated that his commitment to vote "no" was irrevocable.

Upon appellant's attempt to rehabilitate, Pickett reiterated his adamance until he was informed by appellant's counsel that to vote "no" where the facts required a "yes" answer, would be a violation of his juror's oath. Upon inquiry whether he could, under these circumstances, "follow the judge's instructions on what the law is regardless of whether or not you agreed with the law or not", Pickett allowed that, although he might not agree, he "might" follow out of duty. Pickett then began to continue his answer; but after uttering only the word "but", he was interrputed by a question asking whether he could assess the death penalty in case of a poisoning of a child to collect insurance, the explosive destruction of a planeload of people, or the burning down of an orphanage. He could not.

Veniremember Anderson also expressed a fixed opinion against the death penalty, and stated that he could not

recommend a sentence of death and would vote against such a penalty in every case regardless of facts. He, too, upon being told that Texas' death penalty scheme requires the answering of questions of fact rather than an explicit recommendation of life or death, stated that he would answer at least one question "no", so as to prevent the imposition of a sentence of death.

Anderson further stated that it would be impossible for him to swear that he could render his verdict solely upon the law and the evidence in a capital case.

Upon appellant's attempt to rehabilitate, Anderson stated that he could determine guilt or innocence based upon the facts presented, and that he "could answer those three questions ... yes, or no, based upon the evidence in the case and the evidence alone." When the State again took up the cudgel, Anderson held to his belief that he could find guilt or innocence upon the evidence, but, upon his being told again that "yes" answers to all of the punishment questions would require the court to assess the death penalty, the following exchange occurred:

"A. No, I don't think I could answer them all yes.

"Q. Are you sure about that?

"A. Yes, as far as right now, yeah.

"Q. Okay.

"A. I'm sure.

"Q. Then, at this time before the trial begins, are you telling us that you are irrevocably committed to vote, where all the questions would not be answered yes, so the death penalty would not be imposed, no matter what the evidence or the facts?

"A. Yeah, at this time. Yeah, I would have to say yes."

Upon further questioning by appellant (without further reference to the necessary effect of the answers) Anderson

again stated that "I think I could" answer the questions yes or no according to the evidence as he found it. But when the State again began questioning whether Anderson could answer "yes" to the punishment questions knowing the result of those answers, the following colloquy occurred:

"A. (By the witness) I misunderstood your question.

"Q. (By Mr. Batchelor) You misunderstood Mr. Morris's question?

"A. Yes.

"Q. Then, are you saying now that at this time because of your beliefs against the death penalty you could not answer all of those questions yes if the evidence showed that they were yes, because the judge would have to inflict the death penalty?

"A. No, I don't think I could answer them all yes.

"Q. At this time, before you have heard any evidence in --

"A. Yes, sir.

"Q. And that's no matter what the evidence might show?

"A. Well, at this time, yes, sir.

"Q No further questions."

The court then sustained the State's challenge for cause.

Veniremember Wafer first expressed uncertainty about whether she could participate as a juror in a trial resulting in a sentence of death. Upon explanation by the State of the nature and effect of the punishment questions, Wafer stated that she felt she would have to answer one of those questions "no", that she was irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might be proved, and that her conscientious feelings against the death penalty would take priority over what happened at trial.

Upon appellant's attempt to rehabilitate Wafer, she was asked whether there was any reason she couldn't answer the punishment question, based upon the evidence, and replied "No, not from listening to the evidence, I couldn't, but -- ." What reservations Wafer intended to express remain unclear, because her answer was interrupted, as Pickett's had been, by the interposition of a question postulating the destruction of a planeload of people by explosives, of an orphanage by arson, or of insured offspring by poison:

> "Q. [I]f you were on a jury on one of those types of cases, could you assess the death penalty?
>
> "A. I don't think.
>
> "Q. You could, couldn't you?
>
> "MR. BATCHELOR: Your Honor, I believe she answered no, and then, Mr. Morris said she could. If she could answer herself.
>
> "THE COURT: Can you answer the question? Is that the way you answered the question?
>
> "A. (By the Witness) That's the way I answered it."

Although Wafer was equivocal in her answers at the beginning of the voir dire, once the nature and effect of the punishment phase questions were made clear to her, her response was consistent and clear. Based upon our consideration of the whole of the voir dire of the excluded veniremembers,[8/] we find that each of them made clear that he

---

[8/] We have set out excerpts of the voir dire to illuminate our discussion, but we do not imply that the passages quoted, or any isolated response of a veniremember, can override or obviate the consideration of the voir dire as a whole. See footnote 2, supra.

or she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them," Adams, supra, 448 U.S. at 44, [emphasis in original], and their excusal under Art. 35.16(B)(3), V.A.C.C.P. did not violate the rule of Witherspoon. The grounds of error are overruled.

Appellant next contends the court erred in refusing to charge the jurors that, should they fail to find his confession voluntary, the State relied upon circumstantial evidence. Appellant submitted such a charge, which, except for spelling errors, tracked the then-approved charge on circumstantial evidence and instructed the jury to follow it in case it found the confession involuntary.

Charging the jury specially upon the law of circumstantial evidence, even where no direct evidence has been introduced, is no longer required by this Court. Hankins v. State, ___ S.W.2d ___ (No. 60,914, Tex.Cr.App., delivered March 1, 1981). A fortiori, no error will lie where a conditional charge on circumstantial evidence is denied.

Appellant next contends the court erred in its charge to the jury upon voluntariness of the confession by omitting to state that a proper warning under Art. 38.22, V.A.C.C.P should include the information that "[the accused] has the right to terminate the interview at any time."

No evidence was presented before the jury that the confession was not voluntary. Appellant was not entitled to any instruction on voluntariness, because the issue was not properly before the jury. Brooks v. State, 567 S.W.2d 2 (Tex.Cr.App. 1978); Lopez v. State, 555 S.W.2d 643, 649 (Tex.Cr.App. 1976). Further, the charge given was substantially the same as the one requested, and adequately protected the rights of appellant. See Aranda v. State, 506 S.W.2d 221, 226 (Tex.Cr.App. 1974). No error is shown.

Appellant also contends the court erred in overruling his motion to quash the indictment for its joinder in a single paragraph of allegations of murder in the course of committing burglary and murder in the course of committing robbery. These allegations do not, as appellant contends, allege more than one offense, but rather allege alternative means of committing the offense of capital murder. Russell v. State, 598 S.W.2d 238 249 (Tex.Cr.App. 1980); Quinones v. State, 592 S.W.2d 933, 944 (Tex.Cr.App. 1980).

Appellant contends finally that the court erred in overruling his motion for mistrial based upon the State's jury argument at the guilt-innocence phase of the trial, which appellant contends "inferred [sic] there were things about appellant they didn't know."

During appellant's final argument, appellant's counsel attempted to portray the State's evidence as untrustworthy by ridiculing the testimony of an officer who had testified that appellant had slept in a patrol car while being transported from Waco to Corsicana:

> "Another observation I would like to share with you -- I was really amazed that Sheriff Ross said he went to Waco and arrested Paul and brought him back to Corsicana, and handcuffed behind, and he said the man -- here's a man coming from Waco to Corsicana, charged with Capital Murder, handcuffed behind, and he's sleeping? Don't kid me. Sheriff, were you talking to him trying to get him to tell you about the matter? No. Well, if he wasn't talking to him, he should have been. Cause that's his job. But they have the audacity to tell you no, and that the man was trying to sleep? Now, the point is this. Suppose a friend comes to you and wants to borrow money, and he doesn't tell you he just lost his job, and he doesn't tell you he's fixing to leave town. Can you trust him anymore? If they try to misinform you about what happened with a man coming from Waco, would they misinform you about other things?"

The State, in its rebuttal, referred to this argument:

> "... Mr. Morris said he was amazed at the statement that a man came from Waco handcuffed behind and sleeping. I'm amazed too? That that's th

mark of this man right there. Didn't phase him. But we're not talking about him yet.

"We told you, this is about the crime. If you find him guilty, we'll get into him a little bit later.

"MR. MORRIS: Now, we object to that statement and ask the court to instruct the jury not to consider it for any purpose. Its an inference there are things the jury doesn't know, that he's going to tell them about it later.

"THE COURT: I'm going to sustain the objection, and the jury panel is so instructed.

"MR. MORRIS: Because of the magnitude of the statement made by the District Attorney, we ask for a mistrial at this time.

"THE COURT: Overrule. Motion denied."

The gist of the portion of appellant's argument cited, supra, is that a person would not normally sleep while being transported, in handcuffs, in a police car, and that testimony offered by the State that appellant had done so was therefore patently false. The gist of the rebuttal argument as set out is that an alternative explanation for the testimony was that it happened, and that it reflects more upon the nature of appellant than upon the truthfulness of the witness.

Viewing the arguments as a whole, we do not perceive the State's reminder that the identity of the actor and the character of the act, and not the character of the actor, was at stake in the guilt-innocence phase of the trial, and that the latter would become a subject of the second phase, if any, to have been so prejudicial insofar as it had not been invited by appellant's arguments as to have remained uncured by the court's sustaining the objection of appellant and instructing the jury to disregard. See Goocher v. State, 633 S.W.2d 860, 864 (Tex.Cr.App. 1982); Darden v. State, 629 S.W.2d 46, 52 (Tex.Cr.App. 1982). The ground of error is overruled.

The judgment is affirmed.

W. C. DAVIS, Judge

Delivered April 27, 1983

En Banc

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, June 22, 1983

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the Appellant's Motion for Rehearing in Cause No. 68,919 JOSEPH PAUL JERNIGAN

MANDATE STAYED FOR 30 DAYS THE STATE OF TEXAS Appellee.

Sincerely yours,

THOMAS LOWE, Clerk

Court of Criminal Appeals
Box 12308, Capitol Station
Austin, Texas 78711

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MR. M. P. DUNCAN
ATTORNEY AT LAW
101 N. ELM STREET
DENTON, TEXAS 76201

MR. BATCHELOR: Mr. Meador is acceptable to State.

MR. MORRIS: We'll take Mr. Meador.

THE COURT: Mr. Meador, you will be notified. You have been selected as a member of this jury panel, and you will be notified probably a day or two days depending on what time this jury panel is selected, but we'll give you as much time as we possibly can before we actually start the trial. Remember the previous instructions about this case.

MR. MEADOR: Yes, sir.

THE COURT: Okay. We'll be seeing you.

MR. MEADOR: I have one other phone number there. It may be easier to reach me than my home phone number. It's 874-5988. If you can't reach me at the first one, I will be at the other one.

THE COURT: Thank you very much, and you can leave whenever you get ready.

(Juror was excused.)

THE COURT: This is Juror Sheila Wafer. You may proceed, Mr. Batchelor.

INDIVIDUAL VOIR DIRE EXAMINATION OF PROSPECTIVE JUROR WAFER

DIRECT VOIR DIRE EXAMINATION

BY MR. BATCHELOR:

Q Mrs. Wafer, I'm Pat Batchelor. I'll be representing the State in this case along with Mr. John Jackson seated to my right. This is, as the Judge told you, a capital felony case. We'll need to ask you a few questions about your feelings about this particular kind of case in general, and we need to get your true and correct feelings on this, and as definite an asnwer as you can possibly give us, as you can see that we need to be as definite as possible, so we can select the twelve people that will be the most fair to both the State and the Defendant to set in this case, because after we talk to you, and if you were selected as a juror in this case, there is no way to change your mind and say, well, wait. I have thought about it a little more, and I feel this way or that way.

Do you understand that?

A Uh-huh.

Q Basically, there is no right or wrong answers, so maybe that will ease your mind a little bit. We just need to know your personal feelings, and nobody's going to quarrel with any feelings or answer that you give. Okay?

A Okay.

Q As the Court's told you, and we'll tell you, this is a felony that the punishment, that the possible punishment

is the death penalty. The legislature of the State of Texas has provided that murder committed in conjunction with certain other limited circumstances will be a capital murder case. One set of circumstances that is a capital murder is a murder that's committed in the course of committing another felony such as burglary, robbery, an arson, such as this.

Do you have any objection to the law that sets aside these certain cases as being worse crimes?

A No.

Q As we have told you now two or three times, this is a capital murder case. The State will be seeking the death penalty in this case. Could you tell us your personal feelings about the death penalty?

A Well, I don't know -- I just don't feel -- Well, speaking just for me, I don't feel, you know, like giving a person life, taking his life for something that he did wrong, you know. I don't know -- I just don't like having that over my head, that I helped give that man the death penalty, so you know --

Q Are your feelings about the death penalty and your feelings against infliction of the death penalty based on some religious teaching, or are these just conscientious scruples that you have, or is it something that you could put your finger on that you base your opposition to the death penalty on?

A [redacted]

Q Okay. You just don't feel like you could do it?

A Don't feel like I can do it. Right.

Q Okay. Now, the law requires that I ask you a series of questions to determine if your views toward capital punishment are such that you could not serve as a impartial juror in this type of case because of these conscientious feelings. Okay?

A Uh-huh.

Q If you would, we need to have as definite an answer as you can, so we and the Court can make the proper ruling in this case. Okay?

A Okay.

Q The law does not require that a person serve on a jury where that person would have to give up his conscious or moral or religious beliefs in order to follow the law. So, we need to know your true feelings before you are selected, because if we didn't, it would be too late after you got on this jury, as I have told you, and then we couldn't do anything about it. You understand that?

A Uh-huh.

Q How long have you not believed in the death penalty?

A Ever since I have, you know -- well, I don't know how long it's been, but it's been a good while since.

Q Well, have you ever in your adult life -- can you

remember a time that you believed in the infliction of the death penalty, was just?

A No.

Q Are there any, as I said -- are there any particular religious beliefs that you base these feelings on, or are these just your own conscientious scruples against the infliction of the death penalty?

A It's just mine.

Q [redacted]

A [redacted] I think -- if I heard something, you know, like [redacted] juror or something like that [redacted] person done something wrong, you know, [redacted] bad, then, I think I had to [redacted]]END

Q Well, that's basically what we're trying to get after. We're trying to determine whether your feelings are such that you could not be a party to having to get on a jury and facing that situation and voting and saying, yes, I vote for the death penalty.

A Well, you know --

Q If you can, we need to know that. If you can't, we need to know that you can't.

A [redacted]

Q I don't mean to press you, but all I can say is only you know your feelings, and we're trying to determine whether or not you can serve on this jury, or this should be a situation where you could maybe serve on another jury where there is not a death penalty involved, but this would not be the proper case for you to serve on, and have to make you go against your conscience or any of your beliefs and have to vote for the death penalty. Where it would cause you to go against your moral or conscientious beliefs against it, having to take another person's life. Do you understand what I'm saying?

A Uh-huh. But still, I don't think I can do that.

Q Okay. That's basically what I'm getting at.

Then, your belief, your opinion against the death penalty is firm at this time? Just don't feel you could do it?

A I don't feel that I can do it.

Q Would you classify these feelings as strong feelings?

A I would.

Q That's basically what we're trying to get at. Your beliefs. And because of these strong feelings that you have against infliction of the death penalty, even if you were selected as a juror in this case, you would feel like that you would have to follow your conscience and vote against the death penalty in a case so it wouldn't be on your conscience; is that

correct?

A Yes, sir. I guess so. I'm not really sure.

Q All -- as I told you before, the only way that we can find out what you believe is if you can give us a definite answer. Now, I know this is awful hard, but we need as definite an answer as we can, cause there is no way for us to look inside your head and say, yeah, when she says she don't know, she can really do it, or no, we look inside your head and say no, she just -- it would be too much of a strain for you, and you just couldn't do it. Only you can tell us that.

A Well, I don't think I can do it then. Because I'm in deep down that I keep thinking that I helped send this man away to have his life taken away from him. Then, what would that make me feel like?

Q That's -- we've got to know those feelings. This Judge has to know those feelings.

A Well, it would be hard for me to even live with myself if I know that I did that. That's just like me killing somebody myself.

Q The law does not require that you have to do that, but you have to tell us that you can if you tell us , yeah, I think I can, then, you might have to serve on this jury, so that's why you need to tell us whether you can or you can't. Okay?

A Okay.

Q Are these strong feelings that you have against the death penalty strong enough that even if you were selected as a juror, you would feel like you would have to vote against the death penalty in every case, regardless of the evidence?

A Yes, sir.

Q And even if you were sworn in as a juror in these cases to return a true verdict upon the evidence, are you telling us that you could never recommend a sentence of death, regardless of what the evidence was; is that right?

A I really don't know, but -- well, I don't know -- speaking for myself, I don't think I could ever, you know, do anything like that, not giving anybody the death penalty.

Q Okay. Regardless of what the evidence was?

A Regardless of what it is.

Q Then, what you are basically telling me and the court is that your feelings are so strong that you would have to automatically vote against the death penalty in every case regardless of the facts?

MR. MORRIS: Objection. He's putting words in her mouth. He can ask the proper questions, but he's trying to lead this venire person.

MR. BATCHELOR: Your Honor, I must ask these questions according to this motion, and according to Witherspoon.

MR. MORRIS: He's rehashing the same old thing,

Judge.

THE COURT: I'm going to let you ask the question one more time. Proceed, Mr. Batchelor.

Q (By Mr. Batchelor) The question is, are you telling me that your feelings are so strong that you would have to automatically vote against the death penalty in every case, regardless of the facts?

A No.

Q Then, are you telling me that you could vote for the death penalty?

A No, I can't do that either. Well, I guess I can't do either one. If I can't send him away to take his life from him, well, I guess I can't do anybody like that. Well, to answer your question, I did not do it then.

Q That's basically -- we're not trying to make this hard. We're just trying to get your feelings, and we need to get your feelings as definite as we can. Do you understand?

A Yeah, I understand.

Q Capital murder trials are held in two parts. There is a first part of the trial that the jurors listen to the evidence about the crime, and then, they decide one thing and one thing alone. Is the defendant guilty or is he innocent.

Do you understand that?

A Yes.

Q If the jury finds that he's innocent, then, it's all over with. That's the end of the case. If the jury finds he's guilty, then we proceed into the second phase of the trial, which is called the penalty phase, and at that phase of the trial, evidence about the defendant is put on. His reputation, his prior criminal record, if any, so forth and so on.

Do you understand that procedure?

A I think so.

Q Okay. In a capital murder case, after the penalty phase of this trial and the evidence is put on, the jury doesn't actually write in the verdict form death on the verdict sheet. They must answer questions that are submitted by the court, and if they answer each one of these questions yes, the Judge has no choice but must sentence the person to death. If they answer any one of the questions no, the Judge has no choice but sentence the defendant to life imprisonment. Do you understand how this procedure works?

A I think so.

Q If there is anything that you don't, just stop me, and I'll try to explain it. Okay?

A Okay.

Q Are your feelings against the death penalty so strong that you would feel compelled to answer one or more of the questions no so that the defendant could not get the death sentence, but would get the life imprisonment sentence?

A I would, you know, if my feelings would probably be life sentence.

Q Okay. And you would feel like that you would have to answer one of those questions no so he would get the life sentence instead of the death penalty?

A Yes.

Q Then, are you stating to me and the court that because of your conscientious objection against the death penalty, you are irrevocably committed before the trial has begun in this case, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings; is that right?

A Yes.

Q Could you speak up?

A Yes.

Q Then, basically, what you are saying to me and to the court is that your conscience and your conscientious feeling against the death penalty would have to take priorty over what happened or what might occur during the trial; is that correct?

A Yes.

Q Even though you could serve and would have no problem serving on some other type of a case, it would be impossible for you to swear that you could render a verdict solely on the law and evidence in the case where a death penalty is involved; is that correct?

A Yes, it is.

Q And is this a case where your feelings against the death penalty are strong enough that they would interfere with your ability to vote to convict of capital murder knowing that you would have to face the decision on the death penalty if the defendant was so convicted?

A Yes, as far as me, it would be.

Q The law says that the State of Texas is entitled to twelve people who can consider the death penalty as an appropriate and proper punishment for some types of crime, and who will vote to assess the death penalty in a properly proven case. This is a case where your strong feelings against the death penalty might keep you from being completely fair to the State because the death penalty is involved?

A Yes. Like doing some cases, it probably would be for me to not be fair to the State of Texas.

Q Right. And because the death penalty is involved in this case, if you don't feel like you could sit as a fair juror in this state, because of your feelings against the death penalty?

A Well, yes, I don't think I could.

Q Your Honor, we would submit Mrs. Wafer for cause.

MR. MORRIS: We would like to ask a few questions.

THE COURT: All right, sir.

CROSS VOIR DIRE EXAMINATION

BY MR. MORRIS:

Q I'm Jimmy Morris, and Jody Tullos on my left has been appointed along with me to represent Paul Jernigan who is the defendant. This is Frances Griffith, my secretary. I would like to ask you one or two questions, if I may.

May sound juvenile, but you know what an oath is, don't you? You have already taken one as you sat out there to do certain things here in this court. If you are chosen as a juror in this or any other criminal case, you take another oath saying that you will return a verdict based upon the evidence in the case. Is there any reason why you can't take such an oath in this or any other case?

A No, there isn't.

Q How do you feel about taking an oath to God to do your duty as a juror?

A Well, I don't know. It's a heavy burden for me to even -- I have to go to myself, and you know, talk -- well, ask myself questions how I would feel if, you know, put myself in that person's position. Like if I was going to get the death penalty, how would I feel if a bunch of people that's going to send me off somewhere they haven't been.

Q But aside from that, how do you feel about taking an oath to your God? Do you consider it a serious matter?

A That I do.

Q Do you consider it a serious matter between you and your God?

A I do.

Q Is there any reason then why you couldn't take an oath in this or any other case as a juror?

A No, sir. There is no reason. To be fair to that person and to myself and to God, I don't think I could give somebody the death penalty.

Q But you could take an oath?

A I could take an oath.

Q All right. If you sat in this or any other criminal case, could you, and is there any reason why you could not, after taking an oath, make a finding as to the guilt or innocence just stopping right there? Is there any reason why you couldn't find a person guilty or not guilty based upon the evidence as you heard it?

A No.

Q Now, this or any other case, after all the evidence is in, the Court gives what is called a charge to the jury. It's in writing. He tells them what the law is in this particular case, and that you happen to be on a jury, and maybe a burglary case, maybe a murder case. Maybe a theft case, but he tells the jury what the law is on that particular case, the one being tried.

Is there any reason why you couldn't fol-

low the law as the court tells you it is?

A No.

Q If you were a juror in this particular case, he would tell you what constitutes murder. Could you and would you follow the court's charge as to what murder is?

A Well, I could.

Q The Court may tell you in this or any other case what evidence you can consider and what evidence you can not consider. Will you follow what His Honor tells you if you are on this jury or any other jury in this matter?

A I don't really understand what you are talking about.

Q Well, the Court may tell you that, for example, that you shall not consider, and he's already told you that you shall not consider the indictment as any evidence at all. He may tell you that other things should not be considered. Is there any reason why you couldn't follow the Court's charge in that respect?

A No.

Q If you sat on this or any other capital murder case, and you and the other jurors found the defendant guilty, then a capital murder case, you would have to answer those first two questions up there for sure. Is there any reason why you couldn't answer those questions based upon the evidence as you have heard it?

A No, not from listening to the evidence, I couldn't, but --

Q Can you think of any type of a case such as someone blowing up a planeload of people, or someone setting fire to an orphanage, or someone poisoning their own child just to collect insurance -- if you were on a jury on one of those types of cases, could you assess the death penalty?

A I don't think.

Q You could, couldn't you?

MR. BATCHELOR: Your Honor, I believe she answered no, and then, Mr. Morris said she could. If she could answer herself.

THE COURT: Can you answer the question? Is that the way you answered the question?

A (By the Witness) That's the way I answered it.

MR. MORRIS: Pass the venire person back.

REDIRECT VOIR DIRE EXAMINATION

BY MR. BATCHELOR:

Q Basically, Mrs. Wafer, you haven't changed any of the statements you made to me previously, about your strong conscientious feelings against the infliction of the death penalty, have you?

A No, I haven't.

Q And you feel like that no matter what the facts,

you couldn't sit on a jury where you would have to make that decision, and hand down a death penalty; is that correct?

A I don't think I can, no.

Q Your Honor, we would submit.

MR. MORRIS: We think she's qualified, sir. For several reasons, if the Court would like to hear them.

THE COURT: If you have some reasons I don't mind listening to your reasons.

MR. MORRIS: All right. We think she's qualified, because she hadn't said she would automatically vote against the death penalty. She's just voiced generalities against the death penalty. It's obvious there is some kind of cases in which she could inflict the death penalty as a form of punishment.

THE COURT: I'm going to grant the State's Challenge for Cause in this case.

Mrs. Wafer, you may step down, and appreciate you being here with us. The Treasurer's office will mail you a check, and you are excused at this time. Thank you, ma'am.

We will be in recess until the other prospective juror gets here.

MR. MORRIS: We object further to the Court's excusing of this venire person, because it's in con-

travention of the Sixth and Fourteenth Amendments. It denies the Defendant of a representative jury. The statement that a penalty might or might not affect the venire person is not grounds for disqualification.

MRS. TULLOS: Also, Mrs. Wafer did state that she would be able to follow the law in the charge as given to her in this case, and she would not make a conscious distortion of any facts or of any verdict in order just to avoid the imposition of the death penalty, but would indeed answer those questions based upon the evidence presented before her in this courtroom, and on that basis of both Section 12.3 in the Code of Criminal Procedure, and Witherspoon vs. Illinois, she's competent to serve as a juror on capital murder case.

MR. MORRIS: Further, there is no problem with taking an oath and following the court's charge.

I believe that completes our objections.

THE COURT: The objections are overruled.

MR. BATCHELOR: Your Honor, for purposes of the record, if the State's Challenge for Cause had not been granted, the State would have exercised one of its peremptory challenges on Mrs. Wafer.

THE COURT: Anything else? Now, we're going to be in recess.

A I feel comfortable with it.

Q Your Honor, I have no further questions.

THE COURT: Do you have any further questions?

MRS. TULLOS: No. We have no other questions, but we would submit that this juror is qualified.

MR. BATCHELOR: We would submit that she's unqualified, and we would ask that she be excused, and we would use a preemptory challenge.

THE COURT: Mrs. Ellison, you are excused, and you may leave at this time. The Treasurer's office will mail you a check for your service.

This is Juror Billy Anderson, and you may proceed, Mr. Batchelor.

INDIVIDUAL VOIR DIRE EXAMINATION OF PROSPECTIVE JUROR ANDERSON

DIRECT VOIR DIRE EXAMINATION

BY MR. BATCHELOR:

Q Mr. Anderson, I'm Pat Batchelor. I'm District Attorney in Navarro County, and I will be prosecuting this case along with Mr. John Jackson, Assistant District Attorney seated to my right. This case is entitled State of Texas vs. Joseph Paul Jernigan.

MRS. TULLOS: Mr. Anderson, is that the sheet that you are supposed to fill out, with you?

MR. ANDERSON: Yes.

Q (By Mr. Batchelor) We need to ask you a few questions concerning some of the aspects of this case in particular and criminal cases in general. We're not trying to pry into your personal affairs or anything. We hope you realize that. We just need to get your true feelings on these aspects of the law, because only you know how you feel about them. And we pretty much have to rely on what you tell us is your feelings, and what you can or can't do.

If it will make you any more comfortable, I can tell you there is no right or wrong answers. We just need to know your feelings, and nobody here is going to have any quarrels with your feelings or beliefs you have. We just need to know what they are at this time. Okay?

A Okay.

Q This is, as the judge said, a capital felony, and that means that the possible punishment for this offense is the death penalty. The legislature has provided that murder committed in conjunction with certain other limited circumstances will be capital murder. One set of circumstances that is a capital murder, is when murder is committed in the course of committing another felony offense, such as a burglary, a robbery, an arson, a rape, something like this.

Do you have any objections to the laws that set aside these particular murder offenses as being worse

crimes?

A No.

Q As I have told you, this being a capital murder case, the State is seeking the death penalty. Could you tell us your personal feelings about the death penalty and capital punishment in general?

A Well, no. I really don't believe in the death penalty, you know.

Q The law requires that I ask you a series of questions to determine if your views toward capital punishment are such that you could not serve as an impartial juror in this type of case, because of your conscientious feelings.

The law does not require that a person must serve on a jury where that person would have to give up his conscientious, moral or religious feelings in order to follow the law. So, we need to know your true feelings before you were selected, because if we didn't, it would be too late after you got on the jury for anybody to do anything about it. Okay?

A Yeah.

Q How long have you not believed in the death penalty?

A Well, I don't know. I couldn't really say, you know. I just --

Q Can you ever remember a time in your adult life

when you ever have believed in the death penalty?

A No, I can't.

Q Are there any particular religious beliefs that you base your feelings and opposition to the death penalty on, or is it just a conscientious or moral feeling?

A Well, I guess more of a moral feeling.

Q Is at this time your opinion against the death penalty firm and fixed?

A Yes, sir.

Q Because of your strong feelings against the death penalty, is even if you were selected as a juror, you feel like that you would have to vote against the death penalty in every case regardless of the evidence?

A Yeah, I think I would.

Q Even if you were sworn as a juror to return a true verdict upon the evidence, are you telling us and the Court that you could never recommend a sentence of death, regardless of the evidence?

A Well, right now, yeah. I would have to say that I couldn't recommend a death sentence.

Q Okay. Then, what you are telling us, is that your feelings are so strong that you would have to automatically vote against the death penalty in every case regardless of the facts; is that correct?

A Yes.

Q Capital murder trials are held in two parts. The first part is the guilt or innocence stage of the trial. Evidence about the crime is put on, and then, the jury decides whether or not the person is guilty or innocent. The second part of the trial which is called the penalty phase of the trial, evidence is put on about the defendant, and then, the jury is required to answer two or three questions.

Now, the jury doesn't actually write in death or life on that verdict. They answer those questions, but their answers to those questions determine what sentence the defendant will get. Do you understand how that works?

A Yes, I believe.

Q You don't write in death or life on your verdict. You answer two or three questions. Do you understand that?

A Yeah.

Q Now, if the jury, if you answered all of those questions yes, that would mean a death sentence. The judge has no choice but would sentence the defendant to death. If you answered one of those questions no, then, the judge would sentence the defendant to life imprisonment. Do you understand that?

A Yeah.

Q Are your feelings against the death penalty so strong that you would feel compelled to answer one or more of the questions no, so the defendant wouldn't get the death

sentence, but would get the life imprisonment?

A Yeah. Yeah, I believe so, yeah.

Q This is regardless of the evidence?

A Yes, sir.

Q Then, because of your moral or conscientious objections to the death penalty, are you at this time irrevocably committed before the trial begins to vote against the death penalty regardless of the facts or circumstances which might emerge during the course of the trial?

A Yeah, I believe I am, yeah.

Q Then, what you are saying, is if I'm getting your statements right, is that your moral or conscientious feelings against the death penalty would have to take priority over all else that occurred during the trial; is that correct?

A Yes.

Q Even though you could serve and have no problems with serving on some other type of case, it would be impossible for you to swear that you could render your verdict solely on the law and the evidence in the case where the death penalty is involved; is that correct?

A Well, yes, yeah.

Q There was some hesitancy, and what we want to do is make it -- you need to make it as clear as you possibly can. I know some of these questions are hard, but only you know the correct answers. If you could sit on a jury and you

could consider the death penalty, and if the evidence showed that the death penalty should be inflicted, the question is, could you do it because of your objection to the death penalty?

A Well, I really don't know, but as far as right now, I would have to say no, you know.

Q Okay. Like I said, we have no quarrel with that. We just need to know what your feelings are.

A Yeah.

Q Are you saying then that if we went into a trial, and because of your feelings against the death penalty, if the evidence showed that the defendant should be convicted, and should get the death penalty, at this time, you are committed because of your feelings, that you couldn't go against to vote against the death penalty?

A Yes.

MR. MORRIS: Objection. He doesn't vote for or against the death penalty. We ask that that question be stricken and the panel member not be required to answer it.

THE COURT: I'm going to sustain the objection.

Q (By Mr. Batchelor) Okay. You understand -- we went through the procedures, you answered those three questions.

A Uh-huh.

Q And you know in there, if you answer them all yes, that the death penalty must be imposed. You don't actually

write life or death in there, but you know that the way the defendant's going to get the death penalty is to answer those questions yes. If you answer one of them no, then you can prevent him from getting the death penalty, and he would get the life sentence. Do you understand how that procedure works?

A Yes.

Q Is this a case where your feelings against the death penalty are strong enough that they would interfer with your ability to vote to convict the defendant of capital murder knowing that you would have to face the decision on the death penalty if the defendant was convicted?

A Yeah, I would have to say yeah.

Q You feel comfortable with that answer?

A Yes.

Q Are you sure that's what you believe?

A Yes, sir.

Q The law says that the State is entitled to twelve jurors who can consider the death penalty as an appropriate and proper punishment for some types of crime, and who will vote to assess the death penalty in a properly proven case. Is this a case where your strong feelings against the death penalty would keep you from being completely to the State because the death penalty is involved?

A Well, I would have to say yes to that. Yeah.

Q Thank you very much for your answers. We would

submit that Mr. Anderson should not serve on this because of his beliefs against the death penalty and 3516.

CROSS VOIR DIRE EXAMINATION

BY MR. MORRIS:

Q I'm Jimmy Morris, and this is Jody Tullos. We have been appointed by the Court to represent Paul Jernigan who sits here. This is Frances Griffith, my secretary. In this or any other capital murder case, if you are chosen as a juror, you have to take an oath that you will find the facts according to, from the witness stand and whatever they are, you let the chips fall where they may. Is there any objection to you taking an oath? Do you have any objection to that?

A No.

Q And if you are chosen as a juror, your oath would be that you find the facts in the case. Now, in a capital murder case, if you are on the panel, and a member of that jury, could you and would you make a finding as to whether or not the person being tried was guilty or not guilty based upon the evidence alone? Could you do that?

A Yes, sir.

Q Even though you know that the State would be seeking the death penalty if you were required to do so, you could find him guilty or not guilty, couldn't you?

A Yes, sir.

Q And then, if you found you and the other members of the jury, in that hypothetical case, found the defendant guilty, could you answer those three questions if submitted to you, up there, based upon the evidence in the case and the evidence alone? Could you answer them yes or no based upon the evidence as you found it to be?

A Yes, sir, I could.

Q Now, in any capital murder case, the Court informs the jury what the law is. Even though you may disagree with what the law is, could you abide by whatever the Court tells you the law is?

A Yes, sir.

Q For example, he would probably tell you that the indictment is no evidence of guilty, that you are not to consider an indictment, and you could follow that instruction and any other that the Court gave you, couldn't you?

A Yes, sir, I think I could.

Q We pass the venire person, and we submit, your Honor, that he's qualified.

REDIRECT VOIR DIRE EXAMINATION

BY MR. BATCHELOR:

Q Mr. Anderson, we are having some difficulty because of the answers that you have given.

A Uh-huh.

Q I asked you the questions previously phrased a little different than Mr. Morris asked you, and you told me you couldn't. And then, when Mr. Morris asked them, you told him that you could. All we need to know is if you can sit on this jury in spite of your convictions that you have stated against the death penalty and be fair to both the State and the defendant. If you can, then, you ought to have to sit on the jury. If you can't, then, the law does not require you to go against your conscientious beliefs and have to sit on this jury. But only you know what those beliefs are, and only you can tell us.

Could you sit on this jury with your conscientious beliefs against the death penalty, and knowing that the death penalty is a possible punishment, listen to the evidence and if you believe that evidence, find the man guilty, knowing that the death penalty, you would have to face that decision?

MR. MORRIS: Objection to repetition. He's previously asked that question.

THE COURT: Overrule the objection.

MR. BATCHELOR: I asked it, and I got a different answer than Mr. Morris.

THE COURT: Overrule the objection.

A (By the witness) You asked me could I sit on the jury and make a fair decision, huh?

Q (By Mr. Batchelor) Correct. Could you sit on the jury and listen to the evidence and make a fair decision knowing you would be knowing that if you found the man guilty, you were going to have to face the decision on the death penalty? Could you do that?

A I think I could.

Q Do you feel comfortable with that answer?

A (Juror nods.)

Q See, only you know. We can't -- neither I nor the judge or Mr. Morris can read your mind. If you tell us you can, we're going to believe you. That's why we need to know now before you do get on that jury, and then, if you decide that you can't, there is nothing anybody can do about it.

MR. MORRIS: Now, Judge, we object to counsel preaching to this prospective juror. He can ask him questions, but now, he's preaching to him.

THE COURT: Overrule the objection.

Q (By Mr Batchelor) Do you understand how all this works?

A Yes, sir. Yes, sir.

Q Now, if you found the man guilty, based on the evidence, then, we would go into the second phase of the trial where the death penalty is involved. Could you listen to the evidence and answer, if the evidence showed that the

answers should be yes, knowing that the Court would have no choice but to sentence the defendant to death, could you answer those questions yes?

MR. MORRIS: We think that the phrase should be added, based upon the evidence as he finds it in the case.

THE COURT: Overrule the objection.

A (By the witness) No, I'm not sure I could.

Q (By Mr. Batchelor) I know this is tough. It's hard to answer these questions without knowing what the facts are.

A Yeah.

Q But if you can be as definite as you possibly can, it would help. See, what the problem is that we got into while ago, when Mr. Morris asked you questions --

MR. MORRIS: Now, we object to counsel preaching to him again.

MR. BATCHELOR: Your Honor, I'm trying to get this man's feelings.

MR. MORRIS: Let him ask the question and not be preaching to him.

THE COURT: Overrule the objection.

Q (By Mr. Batchelor) Is what you are saying -- I may not be understanding, and I'm not trying to preach to you. I hope you understand that. If you were on a case

because of your conscientious feelings against the death penalty, the evidence showed that the answers to the questions should be yes, beyond a reasonable doubt, because -- knowing that if you answered all those questions yes, that the defendant would get the death penalty. Is this a case where because of your feelings against the death penalty you personally could not answer them yes?

A No, I don't think I could answer them all yes.

Q Are you sure about that?

A Yes, as far as right now, yeah.

Q Okay.

A I'm sure.

Q Then, at this time before the trial begins, are you telling us you are irrevocably committed to vote, where all the questions would not be answered yes, so the death penalty would not be imposed, no matter what the evidence or the facts?

A Yeah, at this time. Yeah, I would have to say yes.

Q No further questions, your Honor.

RECROSS VOIR DIRE EXAMINATION

BY MR. MORRIS:

Q I would like to ask you another question if I may. Mr. Anderson, I know that you are an honest and honorable

man. If you were on that jury, and you found from the evidence that any of those questions should be answered yes, being an honest and honorable man, could you answer them yes?

MR. BATCHELOR: Your Honor, we're going to object at this time. Now, Mr. Morris is preaching to this defendant, and telling him that he's an honorable man. The law does not require that he violate that honor. His conscience, and vote yes, if he has these oppositions to the death penalty.

MR. MORRIS: Is counsel saying that he's not an honest and honorable man?

MR. BATCHELOR: I'm saying he is, and he has a right to have his conscientious beliefs against the death penalty, and Mr. Morris is trying to say that if he's an honest man, he's going to vote to kill this guy which is just not the case. He doesn't have to.

THE COUPT: I'm going to overrule the objection.

Q (By Mr. Morris) Being an honest and honorable man, would you answer those questions according to the evidence as you found it to be, even though you would answer them yes or would you disobey your oath to God and disobey your honorable feelings deep down inside, and your duty to yourself and tell a lie and answer one of those questions no?

MR. BATCHELOR: Your Honor, we're going to obejct. The law does not require him to take an oath if he can't

answer them that way. So, he wouldn't be taking that oath.

THE COURT: I'm going to sustain the objection.

MR. MORRIS: My understanding of the law, Judge, you take an oath to find it, the evidence, as you find it to be.

THE COURT: Mr. Morris, restate your question, please, sir.

Q (By Mr. Morris) If you are on this jury, and knew, the jury has found the person guilty, the person being tried, would you and could you answer those questions according to that evidence as you find them, yes or no? Whatever they may be, would you answer accordingly?

A Yes, I think I could.

Q That's all the questions we have.

REDIRECT VOIR DIRE EXAMINATION

BY MR. BATCHELOR:

Q We're back to where we started again, Mr. Anderson. If you can answer them yes, knowing that the judge will have to impose the death penalty on the defendant, that's what we need to know. And you are a proper juror to serve on this case. If you can do that, we need to know it. If you can't, we need to know that also.

MR. MORRIS: We object to being repetitious.

THE COURT: Overrule the objection.

A (By the witness) I misunderstood your question.

Q (By Mr. Batchelor) You misunderstood Mr. Morris's question?

A Yes.

Q Then, are you saying now that at this time because of your beliefs against the death penalty you could not answer all of those questions yes if the evidence showed that they were yes, because the judge would have to inflict the death penalty?

A No, I don't think I could answer them all yes.

Q At this time, before you have heard any evidence in --

A Yes, sir.

Q And that's no matter what the evidence might show?

A Well, at this time, yes, sir.

Q No further questions.

THE COURT: Still challenge the juror for cause?

MR. BATCHELOR: Yes, your Honor.

THE COURT: I'm going to grant the State's challenge. Mr. Anderson, you are excused from jury service, and we appreciate you being here with us, and the Treasurer's office will mail you a check for your services.

MR. MORRIS: We respectfully object to the court's

ruling for the reason that the venire person has only voiced general objections to the death penalty, that only accusatory examination of the venire person has been made. The venire person would not automatically vote against the death penalty. The venire person is qualified under the statute and the venire person did not say that his attitude toward the death penalty would prevent him from making an impartial decision at the defendant's guilt nor in answering the questions at the punishment stage. The discharge of this venire person is in contravention of the 6th and 14th Amendments, and denies this defendant of a representative jury.

MR. BATCHELOR: For purposes of the record, our challenge was based on Article 3510 and the rulings in Witherspoon, and had the challenge for cause not been granted, the State would have exercised a peremptory challenge on Mr. Anderson.

APPENDIX D

CRIMINAL DOCKET

DOCKET SHEET

CASE NO. 21,184

NUMBER OF CASE	NAMES OF PARTIES	ATTORNEYS	OFFENSE	DATE OF FILING (MONTH / DAY / YEAR)
21,184 L.5501	THE STATE OF TEXAS VS. Joseph Paul Jernigan	Pat Batchelor Jimmy Saunders appted 7-15-81 Jody Fuller appt. Co. Court 8-6-81	Murder (Capital)	7 / 16 / 81

FEE BOOK: VOL. ____ PAGE ____

DATE OF ORDERS (MONTH / DAY / YEAR)	ORDERS OF COURT	MINUTE BOOK (VOL. / PAGE)	INFORMATION OR INDICTMENT WITNESSES
7 / 13 / 81	Defendant in courtroom - Advised he could be held (asked if to would volunteer) appted a for four days, his wife was to get him a lawyer -		
8 / 10 / 81	Set for Jury Trial on Monday, Oct. 12, 1981 at 10:00 A.M. - Jury Panel to report on Mon. 8-12-81 at 10:00 A.M. Jody Fuller appointed Co. Court.		
D 10 / 7 / 81	Def. (Defendant) arraigned - Plea - Trial -		
D 10 / 12 / 81	Jury impaneled - Mot. for Mistrial by D - granted -		
D 10 / 16 / 81	Pre Trial on Voluntariness of Confession: Voluntary		15 / 101
D 10 / 26 / 81	Pre-Trial Conf. re: Jury selection 26-27-28 - 29th		19 / 356
10 / 29 / 81	Jury selection completed at 4:50 P.m. - Reset Pre-trial 10:30 A.M. 11-2-81	Trial 11-2-81	
11 / 2 / 81	Hearing on Voluntariness of Confession Reopening by D - Voluntary - Ruling - Reserved 1:45 P.M. - Evidence 1 P.M.		

THE STATE OF TEXAS CASE #

VS. NO. 21,184

Jessie Rogers

CRIMINAL DOCKET

APPENDIX D

DATE OF ORDER MONTH	DAY	YEAR	ORDERS OF COURT—CONTINUED	MINUTE BOOK VOL	PAGE	
	11	3/81	Charge read to Jury 10:10 am - To Jury 11:24 - Verdict 11:31 - Guilty as charged - Evidence on punishment	1	35	P.m. - Recess at 5:30
	11	4/81	Evidence 9:06 am - Punishment Concluded - 10:33 a.m. - Recess	1	1	P.m. -
			Charge read 1 P.m. - To Jury 1:44 P.m. - Verdict 1:59			
	11	17/81	D. in Court - Sentenced to death - motion set pending appeal (mandatory)			

Office - Supreme Court, U.S.
FILED
OCT 24 1983
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

JOSEPH PAUL JERNIGAN,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ*
Assistant Attorney General
Chief, Enforcement Division

PAULA C. OFFENHAUSER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas, 78711
(512) 475-3281

* Attorney of Record

QUESTION PRESENTED

I. DID THE TRIAL COURT ERR IN EXCLUDING FOR CAUSE TWO VENIREMEN IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968)?

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THE STATE OF TEXAS,

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On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition:

OPINION BELOW

The en banc opinion of the Court of Criminal Appeals of Texas, which is unpublished, is reproduced in Appendix A to the Petition for Writ of Certiorari. 1/ The Texas Court of Criminal Appeals denied rehearing without opinion.

1/ Because the copy of the opinion attached to the Petition for Writ of Certiorari and forwarded to Respondent is illegible in part, Respondent attaches an additional copy to this Brief in Opposition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claim upon the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted on July 16, 1981, in Navarro County, Texas, for the murder of Edward Hale, while in the course of committing and attempting to commit the offense of burglary of a habitation and robbery. On November 3, 1981, the jury found Petitioner guilty of the capital offense and on November 4, 1981, after a punishment hearing, the jury answered affirmatively the special issues submitted to Article 37.071, V.A.C.C.P. Accordingly, punishment was assessed at death. Petitioner appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which, on April 27, 1983, affirmed the conviction and sentence en banc. Rehearing was denied on June 22, 1983.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well-settled constitutional principles to the facts involved herein.

The record in the instant case reflects no error under Witherspoon v. Illinois, 391 U.S. 510 (1968). Each of the veniremen excluded for cause would have been unable to serve as fair and impartial jurors, based upon their opposition to the imposition of the death penalty. As such, no constitutional error is presented and this Court should decline to review this case.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on the writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists. Further, this case presents only the question whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented herein.

II.

THE TRIAL COURT DID NOT ERR IN EXCLUDING FOR CAUSE TWO VENIREMEN IN VIOLATION OF THE DOCTRINE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held, inter alia, that in a capital trial, no venireman could be excluded for cause for his views regarding the imposition of the death penalty unless he made unmistakably clear that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed" at trial. 391 U.S. 522-23 n.21. See also Boulden v. Holman, 394 U.S. 478 (1969); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 448 U.S. 28 (1980). As the state appellate court held, the record reflects that each of these two veniremen were properly excluded because he or she would havr been unable to serve as a fair and impartial juror consistent with Witherspoon principles.

Venireman Shiela Wafer (SF 175-192) twice stated that if selected as a juror, she would automatically vote against the imposition of the death penalty regardless of the evidence (SF 182, 185). She twice claimed that her feelings against the death penalty were so strong that she would feel compelled to answer one or more of the special issues "no" in order to avoid imposition of the death penalty (SF 184-85); that her feelings

against the death penalty were so strong that it would be impossible for her to render a verdict based solely on the law and evidence in a case where the death penalty was involved (SF 185); and that her feelings against the death penalty would interfere with the ability to vote to convict for capital murder (SF 186). Under examination by defense counsel, she initially stated that if chosen as a juror in this case or any other criminal case, there was no reason why she could not take an oath to return a verdict based upon the evidence in the case (SF 187). However, in response to defense counsel's repeated question, she stated that while there was no reason why she could not take such an oath, she did not think she could give someone the death penalty (SF 186). She additionally stated that she could not think of any type of case where she could assess the death penalty (SF 190). On redirect examination by the prosecution, she unambiguously stated that regardless of the facts, she could not vote to impose the death penalty (SF 190-91). Petitioner's contention that venireman Wafer expressed nothing more than general objections to the death penalty and that she never did make is "unmistakably clear that . . . [she] would automatically vote against the imposition of the death penalty . . ." is totally unsupported by the record.

Venireman Billy Anderson (SF 433-49) stated that he would automatically vote against the imposition of the death penalty regardless of the evidence (SF 436). He stated that because of his strong convictions against the death penalty, he would feel compelled to answer one or more of the special issue "no", regardless of the evidence, in order to avoid imposition of the death penalty (SF 437-38). He further stated that it would be impossible for him to swear that he could render his verdict solely on the law and evidence in the case (SF 438) and that his convictions against the death penalty would interfere with his ability to vote to convict a defendant of capital murder (SF 440). On cross-examination, venireman Anderson equivocated,

stating that he could take an oath to render his verdict based upon the evidence in the case and that he could, in a capital murder case, render a verdict and answer the special issues based solely on the evidence (SF 441-42). On redirect examination by the prosecution, he also stated that he could make a fair decision based on the evidence as to guilt in a capital murder case (SF 444). However, he unequivocably stated that because of his convictions, he could not answer the special issues based solely on the evidence knowing that a "yes" answer would result in the imposition of the death penalty (SF 446-47). On recross-examination, he stated then that he could answer the special issues based solely on the evidence (SF 449). However, on redirect examination, he explained that he misunderstood defense counsel's question and again stated that he could not answer the special issues "yes" knowing that the court would have to impose the death penalty (SF 450). The record thus reflects that venireman Anderson was irrevocably committed before the trial began to vote against the death penalty regardless of the facts or circumstances that might arise in the course of the proceedings. Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21. His exclusion did not violate Witherspoon.

As the state appellate court found, the exclusion of each of these veniremen presents no Witherspoon violation. As such, this Court should decline to review Petitioner's claims.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ
Assistant Attorney General
Chief, Enforcement Division

for Leslie A. Benitez
PAULA C. OFFENHAUSER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

APPENDIX A

JCSEPH PAUL JERNIGAN, Appellant

NO. 68,919 v. - - - Appeal from NAVARRO County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appellant was convicted of capital murder. Upon the jury's findings that the killing was deliberate and that appellant represents a continuing threat to society, punishment was assessed at death. Art. 37.071, V.A.C.C.P.

Appellant now contends that his arrest and his subsequent confession, which was admitted into evidence, were tainted by the unlawful procurement of a warrant. The heart of his contention is that because appellant's wife was the named informant relied upon by the affiant in obtaining a warrant, and because a wife cannot testify against her husband, the affidavit was insufficient to support the issuance of the warrant.

Appellant relies upon this Court's decision in Stribling v. State, 215 S.W. 857 (Tex.Cr.App. 1919), in which it was held that an information could not be supported by a complaint sworn to by the spouse of an accused. In that case, the court said: "a wife, being an incompetent witness against her husband, cannot be regarded as a credible witness within the statute...."

Assuming the role of Stribling maintains its vitality,[1/] appellant's reliance is nonetheless misplaced. Appellant

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1/ We note that "the statute", Art. 479 of the Tex.Code of Cr.Proc. (Vernon's, 1911), like its current successor, Art. 21.22, V.A.C.C.P., requires that an affidavit, to support information, must be sworn to by a credible person, not a credible witness. But see footnote 4, infra.

confounds the nature of the affidavits provided for under Arts. 21.22 and Art. 15.05,[2] probably because each is called a "complaint".

Art. 15.05 and Art. 21.22 are derived from separate provisions of the previous codes, and have remained separate.[3] Further, their purposes are separate.[4]

The question presented by appellant's contention, then, is whether Art. 38.11, V.A.C.C.P. by its terms prohibits the use of information supplied by a person to obtain an arrest warrant naming that person's spouse. Art. 38.11 provides in pertinent part:

> "Neither husband nor wife shall, in any case, testify as to any communications made by one to the other while married.... The husband and wife may, in all criminal actions, be witnesses for each other, but ... they shall in no case testify against each other in a criminal prosecution...." [Emphasis supplied]

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[2] Art. 15.05, V.A.C.C.P. sets out the requisites of a "complaint" in support of a warrant of arrest.

[3] Art. 15.05 derives from Art. 220 of the 1856 Code, then succeeded through slight modifications as Arts. 269 and 228 of the 1911 and 1925 Codes, respectively, Art. 21.22's lineage runs from Art. 404 of the Old Code through Arts. 479 and 415 of the codes of 1911 and 1925.

[4] It may be appropriate, for example, to refuse to permit incompetent statements in an affidavit to supply the basis for an information, in that, no further document being needed to bring the accused to trial, no showing that competent evidence would be available at trial would open the door to prosecutorial abuse. A lack of evidence competent at trial should not and does not preclude the issuance of an arrest warrant, however. A warrant is procurable upon hearsay information where circumstances showing the credibility of the informant and the reliability of the information are shown, Jones v. State, 568 S.W.2d 847, cert. den. 439 U.S. 959, 99 S.Ct. 363, 58 L.Ed.2d 352 (1978). An arrest, while part of the accusatory process, may also be part of the investigatory process - as shown by the instant case. And, as here, mere arrest is insufficient to bring the accused to trial.

The language of Art. 38.11 speaks to testimony in a criminal proceeding. Here there was no testimony; indeed there was no criminal proceeding until after the warrant was procured. Nothing in Art. 38.11 prohibits the use of information supplied by a person other than as evidence in a criminal proceeding. A spouse as informant[5/] does not violate Art. 38.11's strictures. The ground of error is overruled.

Appellant next contends the court erred in overruling his motion to dismiss veniremember Nesmith for cause.

Upon voir dire examination of Nesmith by the State, the following exchange occurred:

> "Q. Can you put aside everything that you have heard and read about this case and if you are selected as a juror, render your verdict solely on the evidence that comes to you from that witness stand?
>
> "A. I think my -- I might be biased in that opinion, come from - - I knew the man pretty well.
>
> "Q. Okay. Well, only you know.
>
> "A. I might."

Questioned further, Nesmith stated that he could base his verdict only on the evidence presented, putting aside what he had heard or read about the case. The State's voir dire then continued:

5/ The distinction between informants and witnesses, and a priori between information and testimony, was explicated, in a different context, in Jones v. State, 628 S.W.2d 51 (Tex.Cr.App. 1981). In that case, the appellant was convicted of retaliation against a witness, see V.T.C.A. Penal Code, Sec. 36.06, but the proof showed only retaliation against an informant, which is also denounced by Sec. 36.06, but which was not alleged. Although that case was affected by the inclusion in Sec. 36.06(b) of a definition of "informant" for the purposes of that section, we think the same principles apply here.

"Q. You don't know this particular defendant, do you?

"A. No, sir.

"Q. You haven't established a conclusion as to his guilt or innocence at this time, have you now?

"A. No, sir.

"Q. Then, you feel like that you could listen to the evidence and base that verdict solely on that evidence and not because of anything you have heard?

"A. Yes, sir.

"Q. You are sure about that?

"A. (Juror nods.)

"Q. Can you wait until you hear all of the evidence before you decide he is guilty or innocent?

"A. Yes, sir."

Upon appellant's voir dire, it transpired that Nesmith had known the victim "all my life", and that for that reason "I could be - there is a possibility of [bias]." The following exchange then occurred:

"Q. Even the tiniest bit you could be?

"A. I could be, yes, sir.

"Q. That would be based upon knowing him and perhaps what you have heard about this case?

"A. Yes, sir.

"Q. Your Honor, we submit that because he has used the magic word, that he should be excused in this case.

"MR. BATCHELOR: Your Honor, he hasn't been shown to be excused for cause. Just because he says that he might be biased does not excuse him for cause. Now, he may be, but Mr. Morris needs -- I don't think he's gone into that far enough.

"THE COURT: Do you have any further questions at this time?

"MR. MORRIS: I might, yes, sir.

"THE COURT: I'm going to deny your motion at this time.

"MR. MORRIS: All right.

"Q. (By Mr. Morris) I know you are going to be honest with us, Mr. Nesmith, and from knowing the man, can you honestly say from your heart, that you would be biased at least the tiniest bit of bias and prejudice in this case, if you served as a juror?

"Q. If I was chosen as a juror, no, sir. That's my duty to be a juror, but if I'm chosen as a juror, no, sir, I will not be biased. I will come in here with an open mind.

"Q. But at this moment, you do have such a feeling, don't you?

"A. Yes, sir, right now.

"Q. You have a small, at least a small amount of bias?

"A. Yes, sir.

"Q. Again, we submit, your Honor, that he is not qualified in this case, because of that feeling.

"THE COURT: Mr. Morris, I'm going to overrule your objection at this time."

The remainder of the appellant's voir dire centered around whether Nesmith could, upon signing or participating in a verdict of not guilty, return to his community and "look people in the eye". Nesmith stated unequivocally that he could. No further examination was undertaken upon the issue of bias.[6/]

Although a bias or prejudice toward the accused cannot be cured by a veniremember's statement that he can lay it aside, Williams v. State, 565 S.W.2d 63 (Tex.Cr.App. 1978), no such bias toward appellant is shown here. The "bias"

6/ At the close of the voir dire of Nesmith, appellant renewed his motion to excuse and, upon receiving an unfavorable ruling, exercised a peremptory challenge. A request for an additional peremptory challenge was made and denied upon the seating of the twelfth juror, who appellant stated was unacceptable. This ground of error was thereby properly preserved for review.

herein is closer to the facts shown in Anderson v. State, 633 S.W.2d 851 (Tex.Cr.App. 1982), wherein this Court held that mere acquaintance with the victim and several State's witnesses did not amount to bias against the defendant. In the instant case, as in Anderson, the alleged bias was based upon the veniremember's relationship with the victim, and no bias was directed toward appellant.

Although it is apparent that Nesmith's friendship with the victim was closer than the acquaintanceships relied on in Anderson, the record reveals no more definitive statement of the nature and effect of that friendship than has been set out, supra. While it seems likely that the relationship might have affected Nesmith's ability to avoid bias against appellant in considering the questions on punishment once the jury had determined guilt, the voir dire was directed entirely to the issue of the determination of guilt or innocence. As the proponent of Nesmith's exclusion for cause under Art. 36.16, V.A.C.C.P., the burden of showing grounds for such exclusion rested upon appellant.[7/]

Appellant has not met his burden of showing bias toward appellant, having shown only the use of the word without reference to appellant and an absolute denial that the bias was directed toward appellant himself. The ground of error is overruled.

7/ Such grounds may be shown by extrinsic evidence, Art. 35.18, V.A.C.C.P., as well as by the veniremember's answers on voir dire. Upon appeal, review will be based upon the entire voir dire of the veniremember as well as the extrinsic evidence, if any. Anderson, supra, 633 S.W.2d 854.

Appellant next contends the court erred in excusing three veniremembers who expressed only general objections to the death penalty, in violation of the rule of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

Veniremember Pickett stated that his longstanding opposition to the death penalty would require him to vote against that penalty in every case, regardless of the facts. Upon being informed of the determinations of fact to be made by jurors during the punishment phase of capital murder trials upon a prior finding of guilty, Pickett stated he would answer one question "no" in every case in order to prevent a sentence of death; he further stated that his commitment to vote "no" was irrevocable.

Upon appellant's attempt to rehabilitate, Pickett reiterated his adamance until he was informed by appellant's counsel that to vote "no" where the facts required a "yes" answer, would be a violation of his juror's oath. Upon inquiry whether he could, under these circumstances, "follow the judge's instructions on what the law is regardless of whether or not you agreed with the law or not", Pickett allowed that, although he might not agree, he "might" follow out of duty. Pickett then began to continue his answer; but after uttering only the word "but", he was interrputed by a question asking whether he could assess the death penalty in case of a poisoning of a child to collect insurance, the explosive destruction of a planeload of people, or the burning down of an orphanage. He could not.

Veniremember Anderson also expressed a fixed opinion against the death penalty, and stated that he could not

recommend a sentence of death and would vote against such a penalty in every case regardless of facts. He, too, upon being told that Texas' death penalty scheme requires the answering of questions of fact rather than an explicit recommendation of life or death, stated that he would answer at least one question "no", so as to prevent the imposition of a sentence of death.

Anderson further stated that it would be impossible for him to swear that he could render his verdict solely upon the law and the evidence in a capital case.

Upon appellant's attempt to rehabilitate, Anderson stated that he could determine guilt or innocence based upon the facts presented, and that he "could answer those three questions ... yes, or no, based upon the evidence in the case and the evidence alone." When the State again took up the cudgel, Anderson held to his belief that he could find guilt or innocence upon the evidence, but, upon his being told again that "yes" answers to all of the punishment questions would require the court to assess the death penalty, the following exchange occurred:

"A. No, I don't think I could answer them all yes.

"Q. Are you sure about that?

"A. Yes, as far as right now, yeah.

"Q. Okay.

"A. I'm sure.

"Q. Then, at this time before the trial begins, are you telling us that you are irrevocably committed to vote, where all the questions would not be answered yes, so the death penalty would not be imposed, no matter what the evidence or the facts?

"A. Yeah, at this time. Yeah, I would have to say yes."

Upon further questioning by appellant (without further reference to the necessary effect of the answers) Anderson

again stated that "I think I could" answer the questions yes or no according to the evidence as he found it. But when the State again began questioning whether Anderson could answer "yes" to the punishment questions knowing the result of those answers, the following colloquy occurred:

"A. (By the witness) I misunderstood your question.

"Q. (By Mr. Batchelor) You misunderstood Mr. Morris's question?

"A. Yes.

"Q. Then, are you saying now that at this time because of your beliefs against the death penalty you could not answer all of those questions yes if the evidence showed that they were yes, because the judge would have to inflict the death penalty?

"A. No, I don't think I could answer them all yes.

"Q. At this time, before you have heard any evidence in --

"A. Yes, sir.

"Q. And that's no matter what the evidence might show?

"A. Well, at this time, yes, sir.

"Q No further questions."

The court then sustained the State's challenge for cause.

Veniremember Wafer first expressed uncertainty about whether she could participate as a juror in a trial resulting in a sentence of death. Upon explanation by the State of the nature and effect of the punishment questions, Wafer stated that she felt she would have to answer one of those questions "no", that she was irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might be proved, and that her conscientious feelings against the death penalty would take priority over what happened at trial.

Upon appellant's attempt to rehabilitate Wafer, she was asked whether there was any reason she couldn't answer the punishment question, based upon the evidence, and replied "No, not from listening to the evidence, I couldn't, but -- ." What reservations Wafer intended to express remain unclear, because her answer was interrupted, as Pickett's had been, by the interposition of a question postulating the destruction of a planeload of people by explosives, of an orphanage by arson, or of insured offspring by poison:

> "Q. [I]f you were on a jury on one of those types of cases, could you assess the death penalty?
>
> "A. I don't think.
>
> "Q. You could, couldn't you?
>
> "MR. BATCHELOR: Your Honor, I believe she answered no, and then, Mr. Morris said she could. If she could answer herself.
>
> "THE COURT: Can you answer the question? Is that the way you answered the question?
>
> "A. (By the Witness) That's the way I answered it."

Although Wafer was equivocal in her answers at the beginning of the voir dire, once the nature and effect of the punishment phase questions were made clear to her, her response was consistent and clear. Based upon our consideration of the whole of the voir dire of the excluded veniremembers,[8/] we find that each of them made clear that he

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[8/] We have set out excerpts of the voir dire to illuminate our discussion, but we do not imply that the passages quoted, or any isolated response of a veniremember, can override or obviate the consideration of the voir dire as a whole. See footnote 2, supra.

or she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them," Adams, supra, 448 U.S. at 44, [emphasis in original], and their excusal under Art. 35.16(B)(3), V.A.C.C.P. did not violate the rule of Witherspoon. The grounds of error are overruled.

Appellant next contends the court erred in refusing to charge the jurors that, should they fail to find his confession voluntary, the State relied upon circumstantial evidence. Appellant submitted such a charge, which, except for spelling errors, tracked the then-approved charge on circumstantial evidence and instructed the jury to follow it in case it found the confession involuntary.

Charging the jury specially upon the law of circumstantial evidence, even where no direct evidence has been introduced, is no longer required by this Court. Hankins v. State, ___ S.W.2d ___ (No. 60,914, Tex.Cr.App., delivered March 1, 1981). A fortiori, no error will lie where a conditional charge on circumstantial evidence is denied.

Appellant next contends the court erred in its charge to the jury upon voluntariness of the confession by omitting to state that a proper warning under Art. 38.22, V.A.C.C.P should include the information that "[the accused] has the right to terminate the interview at any time."

No evidence was presented before the jury that the confession was not voluntary. Appellant was not entitled to any instruction on voluntariness, because the issue was not properly before the jury. Brooks v. State, 567 S.W.2d 2 (Tex.Cr.App. 1978); Lopez v. State, 555 S.W.2d 643, 649 (Tex.Cr.App. 1976). Further, the charge given was substantially the same as the one requested, and adequately protected the rights of appellant. See Aranda v. State, 506 S.W.2d 221, 226 (Tex.Cr.App. 1974). No error is shown.

Appellant also contends the court erred in overruling his motion to quash the indictment for its joinder in a single paragraph of allegations of murder in the course of committing burglary and murder in the course of committing robbery. These allegations do not, as appellant contends, allege more than one offense, but rather allege alternative means of committing the offense of capital murder. Russell v. State, 598 S.W.2d 238 249 (Tex.Cr.App. 1980); Quinones v. State, 592 S.W.2d 933, 944 (Tex.Cr.App. 1980).

Appellant contends finally that the court erred in overruling his motion for mistrial based upon the State's jury argument at the guilt-innocence phase of the trial, which appellant contends "inferred [sic] there were things about appellant they didn't know."

During appellant's final argument, appellant's counsel attempted to portray the State's evidence as untrustworthy by ridiculing the testimony of an officer who had testified that appellant had slept in a patrol car while being transported from Waco to Corsicana:

> "Another observation I would like to share with you -- I was really amazed that Sheriff Ross said he went to Waco and arrested Paul and brought him back to Corsicana, and handcuffed behind, and he said the man -- here's a man coming from Waco to Corsicana, charged with Capital Murder, handcuffed behind, and he's sleeping? Don't kid me. Sheriff, were you talking to him trying to get him to tell you about the matter? No. Well, if he wasn't talking to him, he should have been. Cause that's his job. But they have the audacity to tell you no, and that the man was trying to sleep? Now, the point is this. Suppose a friend comes to you and wants to borrow money, and he doesn't tell you he just lost his job, and he doesn't tell you he's fixing to leave town. Can you trust him anymore? If they try to misinform you about what happened with a man coming from Waco, would they misinform you about other things?"

The State, in its rebuttal, referred to this argument:

> ".... Mr. Morris said he was amazed at the statement that a man came from Waco handcuffed behind and sleeping. I'm amazed too? That that's the

mark of this man right there. Didn't phase him. But we're not talking about him yet.

"We told you, this is about the crime. If you find him guilty, we'll get into him a little bit later.

"MR. MORRIS: Now, we object to that statement and ask the court to instruct the jury not to consider it for any purpose. Its an inference there are things the jury doesn't know, that he's going to tell them about it later.

"THE COURT: I'm going to sustain the objection, and the jury panel is so instructed.

"MR. MORRIS: Because of the magnitude of the statement made by the District Attorney, we ask for a mistrial at this time.

"THE COURT: Overrule. Motion denied."

The gist of the portion of appellant's argument cited, supra, is that a person would not normally sleep while being transported, in handcuffs, in a police car, and that testimony offered by the State that appellant had done so was therefore patently false. The gist of the rebuttal argument as set out is that an alternative explanation for the testimony was that it happened, and that it reflects more upon the nature of appellant than upon the truthfulness of the witness.

Viewing the arguments as a whole, we do not perceive the State's reminder that the identity of the actor and the character of the act, and not the character of the actor, was at stake in the guilt-innocence phase of the trial, and that the latter would become a subject of the second phase, if any, to have been so prejudicial insofar as it had not been invited by appellant's arguments as to have remained uncured by the court's sustaining the objection of appellant and instructing the jury to disregard. See Goocher v. State, 633 S.W.2d 860, 864 (Tex.Cr.App. 1982); Darden v. State, 629 S.W.2d 46, 52 (Tex.Cr.App. 1982). The ground of error is overruled.

The judgment is affirmed.

W. C. DAVIS, Judge

Delivered April 27, 1983